Supreme Court, U.S.
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No. 95-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

Joan Carstensen,

Petitioner,

v.

Brunswick Corp., Mercury Marine Corp., and Sea Ray Boats, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Eighth Circuit held that the Federal Boat Safety Act of 1971 preempts a common law claim that a boat was defective because it lacked a propeller guard, even though there is no federal regulation in effect relating to propeller guards on boats. This decision was issued prior to this Court's ruling in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995) ("*Myrick*"), which held that there could be no preemption of a common law claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks where there was no federal regulation in effect relating to antilock brakes in trucks. The questions presented are:

1. Where the decision below found a state common law claim to be preempted solely because the federal government decided *not* to issue a regulation with respect to the product at issue, should the Court summarily reverse, or vacate and remand for reconsideration, in light of the ruling in *Myrick* that federal regulatory inaction does not have preemptive effect?

2. Does the Boat Safety Act preempt a common law claim that a boat was defective because it lacked a propeller guard where: (1) the federal regulatory agency has not adopted any particular standard or regulation with respect to propeller guards; (2) the Boat Safety Act's express preemption provision only applies where there has been "a [federal] regulation prescribed under section 4302 of [the Act]"; and (3) the Boat Safety Act's express savings clause provides that compliance with any such regulation "does not relieve a person from liability at common law or under State law"?

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eighth Circuit (App. 1-7) is reported at 49 F.3d 430 (8th Cir. 1995). The opinion of the district court (App. 8-11) was entered on July 14, 1994.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

The express "preemption clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4306 (1988), reads as follows:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

The express "savings clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4311(g) (1988), reads as follows:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

STATEMENT OF THE CASE

This case presents the question of whether a claim that a boat engine was defective because it lacks a propeller guard is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. V. 1993) ("Boat Safety Act" or "Act"), and by a decision by the United States Coast Guard *not* to issue regulations requiring the use of propeller guards on all motor boats. The Eighth Circuit held that such claims are expressly preempted by the Act, even though: (1) there is no federal regulation or standard relating to propeller guards; (2) the Boat Safety Act's preemption provision only applies where there has been "a [federal] regulation prescribed under section 4302 of [the Act]," 46 U.S.C. § 4306; and (3) the Boat Safety Act's savings clause provides that compliance with any such regulations issued thereunder "does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). That decision, which is in direct conflict with this Court's ruling in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), and with the Texas Supreme Court's holding in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), is the subject of this petition.

A. The Federal Statutory and Regulatory Framework

1. The Boat Safety Act

The Boat Safety Act was enacted to "improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in

which the Coast Guard is operating -- presently the Secretary of Transportation." S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1333. The Act provides that the Secretary of Transportation "may prescribe regulations establishing minimum safety standards for recreational vessels and associated equipment . . .." 46 U.S.C. § 4302(a)(1) (1988). This rulemaking authority has been transferred to the Commandant of the United States Coast Guard. *See* H.R. Rep. No. 338, 98th Cong., 1st Sess. 122-23 (1983), *reprinted in* 1983 U.S.C.C.A.N. 924, 934-35; H.R. Rep. No. 154, 100th Cong., 2d Sess. 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2361, 2363. The National Boating Safety Advisory Committee ("NBSAC") is charged with assisting the Coast Guard in evaluating the need for safety regulations. 46 U.S.C. § 4302(c)(4) (1988).

The Boat Safety Act contains two provisions addressing the effect of Coast Guard regulations on state law. First, Congress included in the legislation an express preemption clause providing, *inter alia*, that:

> a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard . . . that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. Second, Congress included an express *anti*-preemption provision, or "savings clause," that expressly *preserves* all common law claims. It provides:

> [c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

46 U.S.C. § 4311(g).

This savings clause is found in the "Penalties and Injunctions" section of the Act, which also outlines criminal and civil penalties to which violators of the Boat Safety Act may be subject. *See* 46 U.S.C. § 4311(a)-(g) (1988 & Supp. V 1993). Under this section, a person or corporation found to be in violation of the Act may be either criminally liable or "liable to the Government" for a civil penalty. *Id.* § 4311(b) (1988). The savings clause provides that, if a person or corporation is in compliance with the Act, he will not be held liable to the Government, but is still subject to liability "at common law or under State law." *Id.* § 4311(g).

According to the Boat Safety Act's legislative history, the savings clause was

> intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. *The purpose of this section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability.* Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

S. Rep. No. 248, 92d Cong., 1st Sess., sec. 40 (1971), *reprinted in* 1971 U.S.C.C.A.N. at 1352 (emphasis added).

Together, the preemption provision and the savings clause govern the preemptive effect of federal regulations issued pursuant to the Boat Safety Act.

2. The Coast Guard's Decision Not To Regulate Propeller Guards

In recent years, public attention has become increasingly focused on motor-boat propellers "as instruments of devastation that are injuring and killing large numbers of people." Jon S. Vernick and Associates, *Motorboat Propeller Injuries*, published by the Johns Hopkins University Injury Prevention Center and the Institute for Injury Reduction (Sept. 1992), at 1 [R. 270].[1] Propeller-related injuries "are often characterized by massive trauma, including significant blood loss or death." *Id.* at i [R. 266]. Between 1976 and 1990, the Coast Guard officially reported 175 fatalities and 1,438 non-fatal injuries in its *Boating Statistics* category "struck by boat of propeller" -- an average of approximately 100 per year. *Id.*[2]

The injuries associated with unguarded boat propellers have given rise to numerous lawsuits against marine engine manufacturers since the 1970s. *Id.* at 31 [R. 300]. However, despite this litigation, as of 1992 no major marine engine manufacturer had equipped any of its boats with any type of propeller guard to protect people in the water. *Id.*

The growing public controversy over the use of propeller guards led the Coast Guard to consider whether to begin the process of developing a proposed federal regulation mandating their use on passenger boats. As explained above, the Coast Guard has the authority to "prescribe regulations establishing minimum safety standards" for recreational boats. 46 U.S.C. §

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[1] Citations to "R." are to the record below.

[2] It has been estimated that "these data represent substantial and systematic underreporting" of injuries from boat propellers. *Id.*

4302(a)(1).[3] Despite this authority, the agency ultimately declined to begin the formal rulemaking process or draft any proposed regulation with respect to propeller guards. Instead, as explained below, the Coast Guard decided not to commence rulemaking on the basis of internal deliberations that led it to conclude that a nationwide standard mandating propeller guards for passenger boats was not warranted at that time.

The process began in 1988, when, at the Coast Guard's request, a subcommittee of the NBSAC (the "Subcommittee") was formed to investigate the feasibility of requiring guards to prevent underwater propeller accidents. *See Report of the Propeller Guard Subcommittee of the National Boating Safety Advisory Council*, presented November 7, 1989 at 30 [R. 29].

The Subcommittee ultimately recommended that the Coast Guard should take no regulatory action to require propeller guards. *Id.* at 24 [R. 53]. Although the Subcommittee recognized the hazards presented by unguarded boat propellers, it found that "[n]o simple universal design suitable for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible. To retrofit the some 10 to 15,000,000 existing boats would thus require a vast number of guard models at prohibitive cost." *Id.* at 22 [R. 51]. *See also id.* at 24 [R. 53].

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[3] The process for "prescribing regulations" is set forth in the Administrative Procedure Act ("APA"), which contains numerous provisions to ensure that the public is given an opportunity to participate in the rulemaking process and is notified of its results. Specifically, the APA requires an agency to (1) publish "notice of proposed rulemaking in the Federal Register"; (2) give "interested parties an opportunity to participate in the rule making through submission of written data, views, or arguments . . . "; and (3) publish any "substantive rule . . . not less than 30 days before its effective date. . ." 5 U.S.C. § 553 (1994). The APA further requires that the agency "separately state and currently publish in the Federal Register" all "substantive rules of general applicability," as well as "statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D) (1994).

("there are no indications that there is a generic or universal solution currently available or foreseeable in the future.") Thus, the Subcommittee concluded that a regulation mandating the use of propeller guards on all boats was not warranted at that time.[4]

The NBSAC subsequently adopted the Subcommittee's recommendation that the Coast Guard not issue regulations regarding the use of propeller guards on recreational boats. App. 3. *See also Minutes of the 44th Meeting of the National Boating Safety Advisory Council*, Las Palmas Inn, International Drive, Orlando, Florida (Nov. 6-7, 1989) [R. 85]. However, in response to a presentation by a propeller strike victim that the search for new technology should continue, the NBSAC's Chairman "assured the Council and guests that this is not a dead issue. If new pertinent information becomes available, a subcommittee will be reconvened." *Id.* at 19 [R. 103].

On February 1, 1990, the Coast Guard adopted the NBSAC's recommendation that it not issue regulations mandating the use of propeller guards. App. 12-16 (Letter from Robert T. Nelsen, Rear Admiral, U.S Coast Guard, to Mr. A. Newell Garden, Chairman, National Boating Safety Advisory Council (Feb. 1, 1990) ("Coast Guard Letter")). The Coast Guard Letter reiterated the concern that there was no universal solution currently available to solve the propeller guard problem:

> The regulatory process is very structured and stringent regarding justification. Available

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[4] In its report, the Subcommittee discussed the fact that "[a] number of lawsuits have been filed by victims of alleged propeller strikes to recover damages from the operator of the striking vessel and also against the manufacturer of the propulsion unit and/or boat." *Id.* at 4 [R. 33]. The Subcommittee went on to note that, if the Coast Guard were to adopt a regulation mandating propeller guards, "[s]uch mandate would . . . establish prima facie manufacturer liability in having failed to provide them." *Id.* at 5 [R. 34]. It said nothing about what effect, if any, a decision *not* to issue a regulation would have on those lawsuits.

> propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

App. 12. The Coast Guard Letter added, however, that the agency would

> continue to collect and analyze accident data for changes and trends; and will promote increased/improved accident reporting . . . The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art.

App. 13. At no point did the Coast Guard Letter indicate that the agency intended to ban state regulation with respect to propeller guards, or to preempt common law claims relating to a manufacturer's failure to install propeller guards in its boats.

The Coast Guard's decision not to regulate propeller guards was not the product of any formal rulemaking proceeding and did not result in any regulatory action. The Coast Guard Letter, which sets forth the agency's decision not to regulate, was not exposed to public notice and comment and it was never published in the *Federal Register*. Thus, there was no attempt to conform to the notice-and-comment rulemaking requirements of the APA. *See* n.3, *supra*. To date, there is still no federal regulation with respect to propeller guards, and their use is neither mandated nor prohibited by federal law.

B. The Proceedings Below

On June 19, 1989, petitioner Joan Carstensen fell out of a small passenger boat powered by an outboard engine designed, manufactured, and sold by respondents Brunswick Corp., Mercury Marine Corp., and Sea Ray Boats, Inc.[5] Immediately after her fall, she was struck by the unguarded propeller of the boat's engine, causing serious injuries to her pelvis.[6] She filed suit in the United States District Court for the District of Nebraska, alleging that respondents were liable for negligence, strict liability, and breach of implied warranties for failure to equip the boat's engine with a propeller guard.

Respondents moved for summary judgment on the ground that Ms. Carstensen's claims were preempted by the Boat Safety Act, or, in the alternative, that the unguarded propeller was not defective as a matter of law. On July 14, 1994, the District Court granted respondents' motion on the sole ground that petitioner's claims were preempted by the Coast Guard's decision not to issue regulations requiring propeller guards on passenger boats. App. 13.

On appeal, the Eighth Circuit affirmed. The Court ruled that, although there are no federal regulations relating to the use of propeller guards, the Coast Guard's decision not to issue regulations requiring the use of propeller guards "has the same preemptive force as a decision to regulate." App. 3.

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[5] The boat was manufactured by Sea Ray Boats, with an engine and propeller supplied by Mercury Marine. Sea Ray Boats and Mercury Marine are subsidiaries of the Brunswick Corp. App. 2.

[6] The complaint alleges that petitioner suffered, *inter alia*, a "traumatic right hemipelvectomy, permanent disfigurement and disability, physical and mental pain in the past and into the future . . ." and medical expenses of approximately $100,000. Complaint ¶ 9 [R. 9].

The Eighth Circuit went on to hold that petitioner's claims were expressly preempted by the Boat Safety Act. App. 4. Although the Court recognized that the Act's express preemption clause does not mention common law claims, it reasoned that the statutory language "is very broad" and "'suggests no distinction between positive enactments and common law.'" App. 4 (quoting *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992)). As for the Boat Safety Act's savings clause, which expressly provides that compliance with federal regulations "does *not* relieve a person from liability at common law or under State law," 46 U.S.C. § 4311(g) (emphasis added), the Court concluded that the savings clause "should be read as saving only those common law claims that are not expressly preempted." App. 5. Such an interpretation, in the Eighth Circuit's view, was necessary to avoid "subvert[ing]" Congress' goal of "establishing uniform boat safety requirements." App. 5 (footnote omitted).

In so ruling, the Eighth Circuit explicitly rejected a contrary decision of the Texas Supreme Court in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), which held that the Boat Safety Act does not preempt a common law claim that a boat is defective because it lacks a propeller guard. The Court provided no rationale for its refusal to follow *Moore*, other than to state that it found the arguments in favor of preemption to be "more persuasive." App. 6.

As a result of the Eighth Circuit's holding, petitioner and other similarly situated accident victims have been stripped of any means of obtaining compensation for their injuries. *See Moore*, 889 S.W.2d at 251 (Boat Safety Act does not provide compensatory remedies for boat accident victims). Moreover, under the Eighth Circuit's holding, no State is permitted to issue any regulation or take any action to protect its citizens from injuries caused by underwater boat propellers. In the words of the Texas Supreme Court in *Moore*, the State of Nebraska now has no way to protect its "decided interest in providing compensation and

relief for its citizens who are injured on its waterways." *Id.*

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Conclusion that a Decision Not to Regulate Has the Same Preemptive Force as a Decision to Regulate is Directly Contrary to *Freightliner Corp. v. Myrick* and Other Decisions of this Court.

The first reason the writ should be granted is because the Eighth Circuit's holding that the Coast Guard's decision *not* to regulate has preemptive force directly conflicts with the recent holding in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995) ("*Myrick*"), as well as with other decisions of this Court. In light of *Myrick*, which was decided shortly *after* the decision below and specifically held that regulatory inaction does *not* have preemptive force, summary reversal is appropriate. Alternatively, the Court should grant the writ and remand this case for further consideration in light of *Myrick*.

Myrick is dispositive of petitioner's claim because that decision made clear that the mere absence of federal regulation with respect to a particular product has no preemptive effect whatsoever. In *Myrick*, this Court considered whether a claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks was preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1982), and by a federal motor vehicle safety regulation governing airbrake systems in buses, trucks, and trailers. 49 C.F.R. § 571.121 (S3) (1993) ("Standard 121").

As originally promulgated in 1974, Standard 121 required that all truck manufacturers install antilock brakes. This requirement was invalidated by the Ninth Circuit's decision in *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 640 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), which held that, although the

braking performance of some trucks was improved by antilock brakes, "critical problems began with mass production of vehicles designed to meet the Standard." *Id.* at 641. Due to the unforeseen manufacturing difficulties encountered during mass production of antilock systems, the Ninth Circuit ordered NHTSA to suspend the antilock requirements of Standard 121. *Id.* at 643. In response, NHTSA added language to the regulation stating that the antilock brake provisions invalidated by the *Paccar* ruling "are not applicable to trucks and trailers." 49 C.F.R. § 571.121(S3).

In *Myrick*, the truck manufacturers argued that Standard 121 preempted common law claims that their trucks were defective because they lacked antilock brakes. This Court disagreed, holding that there could be no preemption because there was no federal standard in place regarding antilock brakes in trucks:

> [t]here is no express federal standard addressing [antilock brakes] for trucks or trailers. No . . . regulation currently establishes a "minimum standard for . . . motor vehicle equipment performance," § 1391(2), nor is any standard "stated in objective terms," § 1392(a). There is simply no minimum, objective standard stated at all. Therefore, States remain free to "establish, or to continue in effect," their own safety standards concerning those "aspect[s] of performance." § 1392(d).

115 S. Ct. at 1487. In so holding, *Myrick* explicitly rejected the truck manufacturers' claim "that the absence of regulation itself constitutes regulation." *Id.* Mere regulatory inaction, said the Court, carries no preemptive force whatsoever, especially where "there is no evidence that [the federal agency] decided that [the product] should be free from all state regulation . . .." *Id.*

Myrick is squarely at odds with the decision below. In finding federal preemption of petitioner's "no-propeller guard"

claim, the Eighth Circuit embraced the very proposition that was subsequently rejected in *Myrick*: that an agency's "decision not to regulate has the same preemptive force as a decision to regulate." App. 3 (citations omitted). This ruling has the perverse effect of transforming a federal decision *not* to require propeller guards on motor boats into an affirmative decision to *ban* any state regulation requiring propeller guards on any motor boats, as well as any state common law claim simply requiring a manufacturer to pay damages for failing to include a specific propeller guard on a specific boat. Not only is this conclusion contrary to *Myrick*, but it flies in the face of numerous prior decisions of this Court holding that mere federal regulatory inaction, without more, does not imply an authoritative federal determination that the area is best left unregulated. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 496, 503-04 (1988) (federal inaction alone does not have preemptive effect); *Arkansas Elec. Co-Op v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (regulatory inaction only has preemptive force where Congress has made clear that its intention is "to fill a regulatory gap, not to perpetuate one.") (footnote omitted); *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (regulatory inaction has preemptive force in case "where [the agency's] federal power preempts the field.")[7]

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[7] *Puerto Rico*, 485 U.S. 496, is particularly instructive. There, gasoline refineries claimed that a regulation empowering the Secretary of Puerto Rico Department of Consumer Affairs to fix gasoline prices was preempted by the fact that Congress had passed, and subsequently repealed, comprehensive federal statutes providing for allocation and price controls on petroleum products. This Court rejected that claim, stating that Congress' decision to decontrol gasoline pricing did not, in and of itself, mean that a "free market was mandated by federal law." 485 U.S. at 501. To the contrary, the Court stressed that "a 'clear and manifest purpose' of pre-emption is always required." *Id.* at 503. The Court added that "[t]here is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it. When a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn – not from federal inaction alone, but from inaction joined with action." *Id.* (emphasis in original). The Court

The Eighth Circuit also ignored the fact that, as in *Myrick*, "there is no evidence that [the federal agency] decided that [the product at issue] should be free from all state regulation . . .." 115 S. Ct. at 1487. To the contrary, the record gives no indication that the Coast Guard ever intended its action to have any effect on state power. As explained *supra* at 7-8, the Coast Guard's decision not to mandate propeller guards stemmed from its "many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation." App. 12. Due to the lack of a "universally acceptable" solution, the Coast Guard declined to issue a nationwide standard for propeller guards. *Id.* The agency never stated, however, that there was *no* technology appropriate for use in *any* mode of boat operation; rather, the Coast Guard found that there was no technology appropriate for a national, *across-the-board* regulation applicable to *all* types of boats. Contrary to the Eighth Circuit's apparent reasoning, this determination would be entirely consistent with a state's decision to mandate the use of a certain type of propeller guard on specific boats or on boats used for a particular purpose.

There is also no evidence that the Coast Guard intended to restrict the ability of victims of propeller accidents to seek compensation through the common law tort system. To the contrary, the record demonstrates that the Coast Guard was well aware of the on-going litigation regarding propeller guards (*see supra* n.4), yet the agency said nothing to suggest that it intended to preempt such actions in the future. As the Texas Supreme Court found in *Moore, supra,* the Propeller Subcommittee report that was the basis for the Coast Guard's decision not to regulate propeller guards "mentions that manufacturers have been sued for not installing propeller guards, and recognizes that a federal requirement of propeller guards would establish a prima facie case

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concluded that "repeal of [the federal regulatory scheme] did not leave behind a pre-emptive grin without a statutory cat." *Id.* at 504.

of manufacturer liability in some states . . . Thus even if the Coast Guard made a policy determination, carrying preemptive weight, that propeller guards should not be regulated, its preemptive effect would not necessarily include common law." 889 S.W.2d at 252.

The absence of any preemptive intent on the part of the Coast Guard is dramatically underscored by the manner in which its decision was rendered. Under the Boat Safety Act, the Coast Guard is directed to "*prescribe regulations* . . . establishing minimum safety standards . . .." 46 U.S.C. § 4302(a)(1) (emphasis added). In keeping with this directive, Congress clearly intended that only properly promulgated regulations would exert preemptive force under the Act. In this case, however, there was no rulemaking proceeding of any sort, let alone a federal regulation proclaiming the Coast Guard's intention to ban state regulation of propeller guards. Instead, the agency's decision not to regulate was the product of internal deliberations (as opposed to the notice-and-comment rulemaking procedures mandated by the APA[8]), and was embodied in a letter written to the Chairperson of the Coast Guard's own Advisory Council informing him of the agency's decision not to regulate propeller guards. App. 12-16. Not only did the Coast Guard forego rulemaking on this subject, but it declined even to *publish* its informal decision not to commence rulemaking. This is hardly the type of "clear and manifest" expression of preemptive purpose that must be evident before preemption may be found. *Puerto Rico*, 485 U.S. at 503.

At bottom, the Coast Guard's decision not to regulate propeller guards is markedly similar to the fate of antilock brake regulation described in *Myrick*. In both cases, the absence of regulation was due to a determination that the current state of technology did not warrant a universal regulatory solution to a safety problem. In *Myrick*, that decision was made by the Ninth Circuit and then memorialized in the amendment to Standard 121

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[8] *See* n.3, *supra* (describing rulemaking procedures mandated by the APA).

eliminating the antilock brake requirement for trucks and trailers; in this case, the decision not to regulate was made by the agency in the first instance. But the result in both instances was the same: an absence of any federal regulation mandating *or* prohibiting the use of the technology in question. *Myrick* makes clear that federal preemption simply does not exist under these circumstances.

The Eighth Circuit's decision, moreover, has implications far beyond the narrow issue of preemption under the Boat Safety Act. If the decision below is permitted to stand, it could massively broaden the scope of federal preemption far beyond what Congress ever intended. Under the Eighth Circuit's reasoning, *any* federal decision not to regulate could be deemed to have preemptive force, regardless of the reason for federal inaction and regardless of the extent to which Congress made clear its intent *not* to intrude on states' regulatory power and/or strip individuals of their common law remedies. This approach turns the "strong presumption against pre-emption" on its head, *Cipollone,* 112 S. Ct. at 2621, creating, in its place, a powerful presumption in *favor* of federal preemption that arises simply by virtue of agency *in*action. Not only would this constitute a grievous blow against the traditional rights of victims to seek redress for injuries caused by dangerous products, but it would strip States of their historic power to protect the health and welfare of their citizens. Summary reversal is appropriate to prevent this deep encroachment on the rights of States to protect their citizens and of citizens to use the common law to protect themselves -- rights that neither Congress nor the Coast Guard ever expressed any intention to restrict.

II. There is a Direct and Irreconcilable Split Between the Eighth Circuit and the Texas Supreme Court as to Whether "No-Propeller Guard" Claims are Preempted by the Boat Safety Act.

The second reason the writ should be granted is that there is a clear split between the Eighth Circuit and the Texas Supreme

Court as to whether a common law claim that a manufacturer is liable for failing to equip its boats with propeller guards is preempted by the Boat Safety Act.

In *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), the Texas Supreme Court held that the Safety Act neither expressly nor impliedly preempts "no-propeller guard" claims. In its decision, the Court emphasized the strong presumption against federal preemption of state common law claims -- a presumption that "particularly obtains when, as in this case, state regulation of health and safety matters is involved." *Id.* at 249 (citing *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985)). In light of this strong presumption against preemption, the Texas Supreme Court rejected the boat manufacturers' claim that the reference to "law or regulation" in the Boat Safety Act's preemption provision encompasses -- and expressly preempts -- common law claims. *Id.* at 250.

The Court found support for this interpretation in the Act's savings clause, which explicitly *preserves* common law claims. *See* 46 U.S.C. § 4311(g) ("[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.") In the Texas Supreme Court's view, "[the savings clause] demonstrates not only that Congress knew how to explicitly refer to common law when it so desired, but also that Congress did not mean to preempt all state tort law actions under [the preemption provision]." 889 S.W.2d at 250.[9]

The Texas Supreme Court also rejected the boat

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[9] The Texas Supreme Court's interpretation of the Boat Safety Act's express preemption provision was further supported by the fact that "in other enactments Congress had explicitly referred to common law when it meant to include it within the scope of a preemption clause." *Id.* at 250 *4 (citations omitted).

manufacturers' argument that the plaintiff's "no-propeller guard" claim was impliedly preempted under the Safety Act. *Id.* at 251. On this point, the defendants argued that "a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's determination that guards should not be mandated." *Id.* The Texas Supreme Court disagreed, stating, first, that the Coast Guard's decision not to regulate did not "reflect an intention to foreclose state tort liability." *Id.*

As to the boat manufacturers' claim that preemption must be implied because permitting "no-propeller guard" claims would undermine Congress' goal of creating uniform safety regulations, the Texas Supreme Court stated: "the savings clause reflects that Congress was willing to tolerate some tension between the concept that uniform safety regulations should be established at the federal level and the concept that a state may nevertheless award tort damages for unsafe products." *Id.* at 252. This approach makes sense, in the Texas Supreme Court's view, because "the regulatory effect of damage awards is not equivalent to that of positive enactments: a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer -- installing guards on future boats or taking no action and bearing the liability as a cost of doing business." *Id.* at 251 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988)). The Texas Supreme Court ultimately found no basis for finding express or implied preemption under the Boat Safety Act.

Less than one year later, the Eighth Circuit issued its decision rejecting virtually every aspect of the holding in *Moore*. *See* App. 1-7. First, whereas *Moore* held that the Coast Guard's decision not to require propeller guards did *not* reflect an intent to preempt state regulation in that area, the Eighth Circuit came to the opposite conclusion, holding that "[t]he decision not to regulate has the same preemptive force as a decision to regulate." App. 3. Notably, the Eighth Circuit did not even attempt to determine

whether the Coast Guard actually intended to preempt state law; rather, the Court simply assumed that the agency's regulatory inaction has preemptive force. *See id.*

Second, the Eighth Circuit unequivocally rejected *Moore*'s holding that the Boat Safety Act does not expressly preempt common law claims. With respect to the scope of the Act's preemption provision, the Court reasoned that, although "the preemption clause does not specifically refer to common law actions, . . . it is very broad." App. 4. As for the Act's savings clause -- which *does* contain a reference to common law claims -- the Eighth Circuit held that "[the savings clause] should be read as saving only those common law claims that are not expressly preempted." *Id.* Based on its reading of these two provisions, the Eighth Circuit concluded -- contrary to the Texas Supreme Court in *Moore* -- that petitioner's "no-propeller guard" claim was expressly preempted.

Thus, the decision below is squarely in conflict with the Texas Supreme Court's decision in *Moore*. The split is reflected in divergent lower court decisions regarding the scope of preemption under the Boat Safety Act. *Compare Ryan v. Mercury Marine*, No. 163473 (Mich. Ct. App. May 24, 1995) (common law "no-propeller guard" claim preempted under the Boat Safety Act); *Parker v. Outboard Motor Corp.*, No. J90-0011(L) (S.D. Miss. Feb. 25, 1993) (same); *Shield v. Bayliner*, 822 F. Supp. 81 (D. Conn. 1993) (same); *Farner v. Brunswick*, 239 Ill. App. 3d 885, 607 N.E.2d 562 (1992) (same); *Mowery v. Mercury-Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991) (same); *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991) (same); *with Eggen v. Griffith, et al.*, No. B-C-89-31 (E.D. Ark. May 28, 1991) (common-law "no-propeller guard" claim not preempted under the Boat Safety Act); *Mulhern v. Outboard Marine Corp.*, 146 Wis. 2d 604, 432 N.W.2d 130 (Wis. Ct. App. 1988) (common law claim that boat manufacturer was liable for defectively designed boat engine not preempted under the Boat Safety Act); *Rubin v. Brutus Corp.*, 487 So. 2d 360 (Fla. Dist. Ct.

App. 1986) (common law claim that boat manufacturer was liable for defectively designed boat seat not preempted under the Boat Safety Act).[10]

If this Court declines to summarily reverse or vacate and remand for reconsideration in light of *Myrick*, review is warranted to resolve this split, prevent further confusion among the lower courts, and ensure that state law claims which Congress intended to preserve are not preempted.

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[10] In *Carstensen*, the Eighth Circuit stated that *Moore* was the only decision finding no preemption under the Boat Safety Act, and attempted to distinguish *Mulhern* and *Rubin* on the ground that those cases involved "claims for defectively designed products that are actually installed . . .." App. 6. That distinction makes no sense. Like petitioner's claim in this case, both *Mulhern* and *Rubin* included defective design claims. The only difference is that, whereas this case involves a claim that a boat's design was defective because it *lacked* a certain part, *Mulhern* and *Rubin* involved claims that boats were defective because they *included* defectively designed parts. There is no logical reason for distinguishing between the two sorts of claims with respect to preemption, and the Eighth Circuit provided none.

CONCLUSION

The Court should grant this petition for a writ of *certiorari* and summarily reverse or vacate and remand for reconsideration in light of *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995). Alternatively, the Court should grant this petition to resolve the split between the Eighth Circuit and the Texas Supreme Court with respect to the question of whether common law "no-propeller guard" claims are preempted by the Boat Safety Act.

Respectfully submitted,

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Date: July 12, 1995

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2982

Joan Carstensen,	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of Nebraska
Brunswick Corporation, Mercury Marine Corporation, and Sea Ray Boats, Inc.	*	
Appellees.	*	

Submitted: January 13, 1995

Filed: March 3, 1995

Before RICHARD S. ARNOLD, Chief Judge, ROSS, Senior Circuit Judge, and MURPHY, Circuit Judge.

MURPHY, Circuit Judge.

Joan Carstensen appeals the dismissal of her diversity action against the Brunswick Corporation, Mercury Marine Corporation, and Sea Ray Boats, Inc. to recover damages for injuries she

received when she fell out of a boat and was struck by the engine's propeller. Her complaint alleged that appellees failed to design, manufacture, or equip the boat and engine with a propeller guard.[1] The district court[2] held that Carstensen's state law tort claims were preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (FBSA). We affirm.

Carstensen argues on appeal that the FBSA preemption clause, 46 U.S.C. § 4306, does not expressly preempt her common law claims and that its savings clause, 46 U.S.C. § 4311(g), specifically preserves them. Appellees respond that the statute expressly preempts common law damage actions and that its savings clause should not be interpreted to the contrary.

The FBSA expressly states the intent of Congress to preempt state laws or regulations that are not identical to a regulation promulgated under the act:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical

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[1]The boat had been manufactured by Sea Ray Boats, Inc. with an engine and propeller supplied by Mercury Marine. Sea Ray Boats, Inc. and Mercury Marine are subsidiaries of the Brunswick Corporation.

[2]The Honorable William G. Cambridge, United States District Judge for the District of Nebraska.

to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306.

Rulemaking authority under the FBSA related to recreational vessels has been delegated to the United States Coast Guard,[3] which has specifically rejected proposed regulations requiring the use of propeller guards. On February 1, 1990, the Coast Guard adopted the recommendation of the National Boating Safety Advisory Council that the "U.S. Coast Guard should take no regulatory action to require propeller guards,"[4] and the official position that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation, Safety and Waterway Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council 1 (Feb. 1, 1990).

The decision not to regulate has the same preemptive force as a decision to regulate. See Bonito Boats, Inc., v. Thunder Craft Boats, Inc., 489 U.S. 141, 151-52 (1989); Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board, 474 U.S. 409, 422 (1986); Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv.

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[3]The FBSA provides that the Secretary of Transportation "may prescribe regulations establishing minimum safety standards for recreational vessels and associated equipment . . ." 46 U.S.C. § 4302(a)(1). The Secretary may delegate his authority under the FBSA to "a person, private or public agency, or organization." 46 U.S.C. § 4303(a). Pursuant to § 4303(a), the Secretary of Transportation has delegated his powers and duties under the Act to the Commandant of the Coast Guard. H.R. No. 338, 98th Cong., 1st Sess. 122-23 (1983), reprinted in 1983 U.S.C.C.A.N. 924, 934-35; H.R. Rep. No. 154, 100th Cong, 2d Sess. 9 (1988), reprinted in 1988 U.S.C.C.A.N. 2361, 2363.

[4]Minutes of the 44th Meeting of the National Boating Safety Advisory Council 17-19 (Nov. 6-7, 1989).

Comm'n, 461 U.S. 375 (1983). Any state law or regulation requiring manufacturers to install propeller guards would not be identical to the Coast Guard regulatory position.

As Carstensen points out, the FBSA preemption clause does not specifically refer to common law actions, but it is very broad. The clause preempts any state "law or regulation . . . imposing a requirement for associated equipment . . . ." The broad language "suggests no distinction between positive enactments and common law." Cipollone v. Liggett Group, Inc., 505 U.S. __, __, 112 S. Ct. 2608, 2620 (1992). It is well established that "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" Id. (quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959)); National Bank of Commerce v. Kimberly-Clark Corp., 38 F.3d 988, 990 (8th Cir. 1994).

Allowing a jury to assess damages for failure to install a propeller guard would create, in effect, a state requirement that guards be installed. State damage actions based on such failure would establish a regulation "imposing a requirement for associated equipment" that is not identical to that prescribed by the Coast Guard. When Congress has drafted a specific preemption provision that "provides a 'reliable indicium of congressional intent with respect to state authority," the scope of preemption is defined by its express terms. Cipollone, 505 U.S. at __, 112 S. Ct. at 2618 (1992). We conclude that the preemption clause of the FBSA expressly preempts such claims.

Carstensen argues that the savings clause in the FBSA must alter the preemption analysis. The statute's "penalties and injunctions" section includes a clause which provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person

from liability at common law or under State law." 46 U.S.C. § 4311(g).

A savings clause should not be read to save those common law rights, "the continued existence of which would be absolutely inconsistent with the provisions of the act." Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907). A general remedies savings clause "cannot be allowed to supersede the specific substantive pre-emption provision." Morales v. Trans World Airlines, Inc., 504 U.S. __, __, 112 S. Ct. 2031, 2037 (1992) (finding common law claims to be preempted by the Airline Deregulation Act of 1978). Instead, interpretation of a savings clause "must be guided by the goals and policies of the Act." International Paper Co. v. Ouellette, 479 U.S. 481, 493 (1987) (Clean Water Act).

The preemption clause of the FBSA specifically provides that any state requirements that differ from the federal regulations are preempted. This is consistent with the statute's goal of establishing uniform boating safety requirements.[5] The general savings clause should not be interpreted to subvert this goal. Instead, it should be read as saving only those common law claims that are not expressly preempted. Such an interpretation does not render the savings clause superfluous.

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[5]The legislative history of the preemption clause explains that

> This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements.

S. Rep. No. 248, 92d Cong., 1st Sess., reprinted in 1971 U.S.C.C.A.N. 1333, 1341.

This stated purpose of the savings clause is "to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability." S. Rep. No. 248, 92d Cong., 1st Sess., reprinted in 1971 U.S.C.C.A.N. 1333, 1353. Not all common law claims have the effect of establishing a safety standard or requirement. For example, common law claims asserting liability for defectively designed products that are actually installed may not be preempted. See, e.g., Mulhern v. Outboard Marine Corp., 432 N.W.2d 130 (Wis. Ct. App. 1988) (claims based on defective throttle not preempted by FBSA); Rubin v. Brutus Corp., 487 So. 2d 360 (Fla. Dist. Ct. App. 1986) (claims based on defective seat not preempted by FBSA).

Our analysis in this case is consistent with that of other courts that have considered whether claims based on the failure to install propeller guards are preempted by the FBSA. See, e.g., Shield v. Bayliner Marine Corp., 822 F. Supp. 81 (D. Conn. 1993); Shield v. Outboard Marine Corp., 776 F. Supp. 1579 (M.D. Ga. 1991); Mowery v. Mercury Marine, 773 F. Supp. 1012 (N.D. Ohio 1991); Farner v. Brunswick Corp., 607 N.E.2d 562 (Ill. App. Ct. 1992). In Mowery, for example, the court concluded that a failure to install claim is "explicitly preempted by the FBSA" and that the "savings clause is inapplicable" in such cases. 773 F. Supp. at 1017. The rationale of this line of cases is more persuasive than that of the sole court that has held to the contrary. See Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246 (Tex.), cert. denied, 115 U.S. 664 (1994).[6]

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[6]Carstensen also directs our attention to Myrick v. Freuhauf Corp., 13 F.3d 1516 (11th Cir.), cert. granted sub nom. Freightliner Corp. v. Myrick, __U.S. __, 115 S. Ct. 306 (1994), in which the Eleventh Circuit held that common law claims based on failure to install anti-lock brakes are not preempted by the National Traffic and Motor Vehicle Safety Act (NTMVSA). Myrick is not dispositive here because of the distinct difference between the language of the NTMVSA preemption and savings clauses and that of the

We conclude that Carstensen's state tort claims based on the failure to install a propeller guard are preempted by federal law and affirm their dismissal.
A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

FBSA. See id. at 1520.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOAN CARSTENSEN,	)	8:CV93-270
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	MEMORANDUM OPINION
BRUNSWICK	)	AND ORDER
CORPORATION,	)	
MERCURY MARINE	)	
CORPORATION,	)	
AND SEA RAY BOATS,	)	
INC.	)	
	)	
Defendants.	)	

THIS MATTER IS before the Court on the defendants' motions to dismiss or in the alternative for summary judgment and for oral argument, (filing no. 11), and for an extension of time to file a reply brief, (filing no. 18). The Court finds that the motion to dismiss should be granted, the motion for oral argument denied, and the motion for an extension of time to file a reply brief denied as moot.

The plaintiff, Joan Carstensen, was injured when she fell out of a boat and was struck by the engine's propeller. She alleges that the boat involved was manufactured by Sea Ray Boats, Inc. with the engine and propeller supplied by Mercury Marine. Mercury and Sea Ray are subsidiaries of Brunswick (hereinafter the defendants are collectively referred to as "Brunswick"). Carstensen bases her complaint on Brunswick's failure to design, manufacture, or equip the boat and engine with a propeller guard. Brunswick asserts that the claim should be dismissed because it is preempted by the Federal Boat Safety Act of 1971 ("FBSA"), 46 U.S.C. § 4306, or, in the alternative, the Court

should grant summary judgment because an unguarded propeller is not unreasonably dangerous as a matter of Nebraska law.

Congress has the power to preempt state law under the Supremacy Clause contained in the United States Constitution. U.S. Const. art IV, cl. 2; Cipollone v. Liggett Group, Inc., 505 U.S. __, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407, 422 (1992). The Court must examine Congressional intent to determine whether a claim is preempted. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300 (1988).

The FBSA contains a preemption clause that expressly states Congress' intent to prohibit states from promulgating recreational boating equipment safety standards that are not identical to those in the FBSA. The FBSA preemption clause provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306.

"The purpose of this provision 'is to standardize regulations applicable to the manufacture of boats by precluding states from adopting requirements that conflict with federal standards.'" Mowery Mercury Marine, Div. of Brunswick Corp., 773 F. Supp. 1012, 1014 (N.D. Ohio 1991) (quoting Rubin v. Brutus Corp., 487 So. 2d 360, 363 (Fla. Ct. App. 1986)). The Secretary of Transportation promulgates the national regulations

set out in the FBSA, 46 U.S.C. § 4302(a)(2), but the regulatory authority has been delegated to the United States Coast Guard. The Coast Guard declined to adopt regulations requiring the use of propeller guards. When federal officials do not exercise their full authority in such a manner so that it takes on a character that no regulation is appropriate or approved pursuant to the statute, a state cannot use its police power to enact such a regulation. Shields v. Outboard Marine Corp, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991); Mowery, 773 F. Supp. at 1016. In addition, the purpose of the FBSA is to promote boating safety by standardizing regulations relating to the manufacture of boats. Shields, 776 F. Supp. at 1581. To allow a jury to decide the question of boat safety might result in a variety of regulations that would be inconsistent with the purpose of the FBSA.

The plaintiff argues that the savings clause contained in the FBSA allows her to assert her claims. The clause states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). This provision has been interpreted to mean that a manufacturer cannot use compliance with the minimum safety standards in the FBSA as a defense against liability for defective products that are actually installed. Mowery, 773 F. Supp. at 1017.

The savings clause also indicates that the entire field of boat safety regulations is not occupied but that plaintiffs may assert state law claims based on state statutes or regulations which have not been displaced by the FBSA, i.e. rules which are identical to those in the FBSA and do not conflict with its objectives. Shields, 776 F. Supp. at 1582. Although there is room for concurrent federal and state regulation, it is only to the extent allowed by the federal government. The savings clause does not allow the plaintiff to assert her claim because it would be contrary to the non-requirement of propeller guards and to the

goal of uniform regulations. Id. For these reasons, the court finds that the savings clause does not apply to this case.

The court finds that the FBSA preempts the plaintiff's claims for failure to provide a propeller guard. The court must dismiss the claims because it is without subject matter jurisdiction over them.

IT IS ORDERED:

1. the defendants' motion to dismiss or in the alternative for summary judgment, (filing no. 11), is granted;

2. the defendants' motion for oral argument, (filing no. 11), is denied;

3. the defendants' motion for an extension of time to file a reply brief, (filing no. 18), is denied as moot; and,

4. this action is dismissed.

Dated this 14 day of July, 1994.

BY THE COURT:

/s/
William G. Cambridge
United States District Court

Department of Transportation
United States Coast Guard

Commandant
United States Coast Guard

Washington, D.C.
Staff Symbol: G-NAB
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16750
000117
Feb 1, 1990

Mr. A. Newell Garden
Chairman, National Boating
Safety Advisory Council
20 Hunter Street
West Newton, MA 02165

Dear Mr. Chairman:

We have completed our review of the "Report of the Propeller Guard Subcommittee" which was approved by NBSAC on 7 November 1989. All of the report's recommendations are accepted. The recommendations will be implemented within resource limitations as outlined below:

NBSAC Recommendation 1. The U.S. Coast Guard should take no regulatory action to require propeller guards.

Coast Guard Position. The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

The Coast Guard will continue to collect and analyze accident data for changes and trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art.

NBSAC Recommendation 2. The U.S. Coast Guard should, through improved accident reporting and analysis, develop a complete and comprehensive data base on underwater impact accidents. This should involve, as an integral part, U.S. Coast Guard involvement in the National Electronic Injury Surveillance System (NEISS) and the appropriate training of involved hospital personnel.

Coast Guard Position. There are several avenues to obtaining better accident data. The key is accident investigation. The Coast Guard has been promoting and assisting increased and improved state boating accident investigation for a number of years. Several Coast Guard initiatives have been applied including development of a comprehensive "Marine Accident Investigation Manual," an annual series of Boating Accident Investigation Seminars around the country, and installation of an accident investigation module at the Coast Guard's National Boating Safety Course for state personnel. The need for a closer look at boat and propeller strike accidents will be stressed in the training.

We intend to go beyond existing Coast Guard/state accident reporting channels. We have explored Coast Guard participation in the National Electronic Injury Surveillance Systems in the past and will take a renewed look at participation. Additionally, we are seeking proposals to improve accident reporting and analysis through our National Nonprofit Public Service Organization Grant Program. We are, for example, considering the use of

college students to gather hospital emergency room and clinic information on boating accidents.

NBSAC Recommendation 3. The U.S. Coast Guard should implement necessary steps to have included in national and state level educational and awareness campaigns the information regarding potential hazards associated with careless or negligent boat operation. Such programs should be on a continuing basis and be as vivid as possible in depicting underwater impact accident scenarios. These programs should state in a positive manner how such accidents can be prevented by diligent, informed boat operators.

Coast Guard Position. National educational campaigns have been aimed at the major causes and types of boating accidents and means of preventing and mitigating, e.g., need for education and PFD wear, drinking and boating problems, capsizing and falls overboard from small boats. More specific campaigns focused on hypothermia, problems associated with boat use for fishing and hunting, etc. While struck by boat and/or propeller accidents aren't among the major types of boating accidents, careless and negligent operation are major causes of boating accidents. Results and means of avoiding underwater impact accidents could effectively be interwoven into campaigns aimed at negligent operation. The Coast Guard will explore means and opportunities for doing and promoting this. A series of articles in our Boating Safety Circular will be developed aimed at avoiding boat/propeller strike accidents. Topics could include, for example, hazards, available propeller guards, warning labels, keeping people in the boat, avoiding bow and rail riding, avoiding swimming areas, etc.

NBSAC Recommendation 4. The U.S. Coast Guard should work with appropriate voluntary standards making organizations (such as ABYC and SAE) to develop meaningful warning labels, and define their most effective locations, concerning the hazards of underwater impacts.

Coast Guard Position. The Coast Guard is soliciting for project proposals to do this through our national Nonprofit Public Service Organization Grant Program. If this mechanism is unsuccessful, we will approach ABYC and SAE regarding including warning label development in their respective work programs.

NBSAC Recommendation 5. The U.S. Coast Guard should review manufacturing safety standards of watercraft, emphasizing the importance of keeping passengers and operators in the boat, and maintaining the unobstructed fore and aft view of the boat operator.

Coast Guard Position. Improvements may be difficult to address through the regulatory process because of the need for quantitative justification and the vast array of boat configurations. The Coast Guard will make industry more aware of the considerations of adequate operator visibility and designs to facilitate keeping persons in the boat. Voluntary standards and design guidelines may be the only alternative to address this recommendation in a structured fashion.

NBSAC Recommendation 6. The U.S. Coast Guard should encourage a systematic review of current enforcement programs aimed at reducing boat accidents, and should provide all possible support to implement, maintain and expand those programs targeting the prevention of accidents.

Coast Guard Position. Enforcement is a major component of a boating safety program. Initially, the Coast Guard will address this recommendation through guidance to and feedback from the states associated with the allocation and use of state financial assistance, also, the Coast Guard's National Boating Safety Course for state personnel. We will ask NASBLA to task its Law Enforcement/Uniform Boating Laws Committee with a review of enforcement programs.

Mr. Chairman, NBSAC members have handled this difficult and controversial task in an even-handed and professional manner. I want to commend you for your continuing leadership of the Council and the members of the propeller guard subcommittee for their fine work. Please pass my thanks to all the Council members for their work on behalf of safe boating.

Sincerely,

/s/
ROBERT T. NELSON
Rear Admiral, U.S. Coast Guard
Chief, Office of Navigation Safety
and Waterway Services